IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1359 OF 2005

IN

SUIT NO.3247 OF 1993

1. Anskar Francis Pareira
and another. ...Plaintiffs.

Vs.

1. JBC Garden Society & others ...Defendants.

Ms.G.B.Kedia, for Plaintiffs.

Mr.Gautam Mehta i/b. Apte & Co. for Defendants 1 & 2.

Ms.Pimple, for Defendant no.3.

CORAM: D.K.DESHMUKH, J.

DATED: 2nd May,2006

P.C.:-

1. This is a notice of motion taken out by the plaintiffs. The plaintiffs have filed the suit for a decree of declaration that the defendant nos. 1 to 3 have no right, title and interest in the property i.e plot of land bearing CTS nos.408 and 437 situated at

Village Valnai, Marve Road, Malad (West), Mumbai, admeasuring 4154.52 square yards described at Ex.B. The plaintiffs are also claiming decree of possession of the suit property against defendant nos. 1, 2 and 3.

2. The plaintiffs have taken out a notice of motion in this suit bearing Notice of Motion no.2269 of 1993. That notice of motion is decided by this Court by order dated 15.10.1996. This Court by that order has found that the subject matter of the suit are two plots i.e. part of Plot nos.19 and 20 which according to the lay out plan were reserved as open site for recreation ground. The possession of these two plots were given to defendant no.1 the Co-operative society for management of those plots as recreation ground. Because the defendant no.1 Society was found to be using the plots for commercial purpose, the notice of motion was taken out and this Court by order dated 15.10.1996 granted temporary injunction in terms of prayer clause (b) and (c) of that notice of motion. The effect of the order was that the plots were to be kept open for recreation ground and were not to be used for commercial purpose. Though that order is operating since 1996,

the present notice of motion is taken out because the plaintiffs have found that the Respondent nos. 1 and 2 have started raising construction on the land. It is common ground before me that the original owner of the entire land including these two plots was one Gregory Joseph D'Souza who died in the year 1990. He left behind a Will. The present plaintiffs are the executors of that Will. So far as the respondent nos. 1 and 2 are concerned, against whom the present notice of motion is basically directed, claim to be developers of the property, according to them, a suit was filed by the original owner Mr.Gregory Joseph D'Souza against Mr.Randelia through whom the Respondents are claiming in the City Civil Court which was registered as Civil suit no.2598 of 1968. According to the respondent nos. 1 and 2 consent terms were entered into between the said Mr.Gregory D'souza and Mr.Randelia through whom the respondent no.1 and 2 claim. As a result of those consent terms, the plaintiff-Gregory D'Souza agreed to convey the suit property i.e land admeasuring 900 sq. yards bearing Survey no.30 Hiss no.1(P) now having City Survey No.437 of Valni, Taluka Borivali, Bombay Suburban District. According to the respondent nos.1 and 2 these consent terms were entered into on

19.6.1963 and the consent decree in the suit was passed. According to respondent nos.1 and 2, the decree passed in the suit was to operate as conveyance of the property. Admittedly, Mr.Gregory D'souza died in the year 1990. Till his death, the decree was not registered with the Registrar of the documents, which was absolutely necessary if the decree was to operate as a conveyance of the property. According to the respondent nos.1 and 2 the registration of the decree was in the year 1993 after about three years of the death of original owner of the property. There is also a dispute between the parties about the identity of the property to which the consent terms relate and the suit property. According to the respondent nos. 1 and 2, Mr.Randelia in whose favour the property was transferred by the consent terms has given them right to develop the property. It prima facie appears that the conveyance of the property not having been registered during the life time of the original owner and as the registration took place in the absence of the executors of the Will of the deceased Mr.Gregory D'Souza, the registration would be ipso facto invalid. Because in the absence of registration of the decree as conveyance, the property would

continue to be the property of the deceased Mr.Gregory D'souza at the point of his death and on his death it will pass on to the executors of the Will and therefore, in their absence, in any case without notice to them, the conveyance of the property in favour of Mr.Randelia could have never taken place in Law. The silence of the so called decree-holder to get the document registered in his favour for a long period of 30 years after the decree was passed raises doubt about genuineness of the whole transaction. It is common ground that it is only on the basis of the consent decree, that the respondent nos. 1 and 2 are trying to raise construction on the land. It is apparent from the interim order made by this Court referred to above that the plots were to be reserved as recreation ground. It appears that there was some litigation between the predecessor of respondent no.1 and 2 and the Society. The Society which was kept in management of the property, it appears, has kept the Court, where that litigation was pending, in dark about the order made by this Court. There is already allegation made against the defendant no.1 Society that it was making attempt to use the property for commercial purpose. Now the respondent nos. 1 and 2

are claiming to be in possession. It is true that presently neither Mr.Randelia nor the respondent nos.1 and 2 have been joined as parties to the suit. The plaintiff will have to join them as parties to the suit. However, in the facts and circumstances of this case the Court will not be justified in refusing to make suitable interim order in relation to the suit property only for that reason because otherwise public interest may be irreparably injured. As per the previous orders of the Court, the defendant no.1 Society was to be in possession but was not to use the land for commercial purpose, but though respondent nos.1 and 2 started construction on the land, the Society has not taken any action. If in these circumstances the Court does not take effective steps to protect the property at this stage it is possible that the plots which are kept as recreation ground may be constructed upon. Therefore, in my opinion, to safeguard the interest of public it would be appropriate to appoint receiver on the property so that the property is protected. The notice of motion is therefore, granted in terms of prayer clause (a).

3. The Receiver shall appoint the plaintiffs to be the agents of the Receiver to be in possession of

the property. The plaintiffs shall be in possession of the property as agents of the Receiver to protect the property and to maintain it as a recreation ground.

4. The agents of the Receiver shall not use the property for any purpose other than as recreation ground and shall not raise any construction thereon. The appointment of the plaintiffs as agents shall be on usual terms and conditions, except security and royalty. The plaintiff shall also take steps to join necessary parties to the suit.

5. At the request of the learned Counsel appearing for Respondent nos. 1 and 2 as they have undertaken to stop construction activity forthwith, the Receiver is directed to take possession after the period of six weeks from today.

6. Till the Receiver takes possession, ad-interim order presently operating shall continue to operate.